

STATE OF MICHIGAN
IN THE SUPREME COURT

SUPREME COURT

OCT 2005

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ESTATE OF DANIEL CAMERON, by
DIANE CAMERON and JAMES
CAMERON, Co-Guardians,

Supreme Court Docket
No. 127018

Plaintiff-Appellants,

Court of Appeals Docket
No. 248315

v

AUTO CLUB INSURANCE ASSOCIATION,

Lower Court Case
No. 02-549-NF

Defendant-Appellee.

SUPPLEMENTAL BRIEF OF
AMICUS CURIAE INSURANCE INSTITUTE OF MICHIGAN

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.
Attorneys for *Amicus Curiae*
Insurance Institute of Michigan

BY: John A. Yeager (P26756)
Matthew K. Payok (P64776)
Leon J. Letter (P57447)
333 Albert Avenue, Suite 500
East Lansing, MI 48823-4394
(517) 351-6200 / Fax: (517) 351-1195



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STATEMENT OF QUESTIONS PRESENTED

- I. In light of the text, different purposes and incongruity, does MCL 600.5851(1) apply to the one year back provision of No-Fault, MCL 500.3145(1)?

Trial Court answer: Yes.

Court of Appeals answer: Not answered.

Appellants answer: Yes.

Appellee answer: No.

Amicus Curiae IIM answer No.

- II. Does MCL 600.5851(1) apply to the “one-year back rule” since it is a statute of repose rather than a statute of limitations and is not a statute of repose tolled by MCL 600.5856?

Trial Court did not address this issue.

Court of Appeals did not address this issue.

Appellants would say “yes.”

Appellee would say “no.”

Amicus Curiae IIM says “no.”

- III. Does MCL 600.5851(1) apply when the minor has not “incurred” expenses and so cannot seek payment of no-fault benefits?

Trial Court did not address this issue.

Court of Appeals did not address this issue.

Appellants would say “yes.”

Appellee would say “no.”

Amicus Curiae IIM says “no.”

ARGUMENT

I. **MCL 600.5851(1) DOES NOT APPLY TO THE ONE-YEAR BACK PROVISION OF MCL 500.3145(1) IN LIGHT OF THE DIFFERENT TEXT, PURPOSES SERVED AND INCONGRUITY OF THE ACCRUAL RULES OF RJA AND NO-FAULT.**

Both appellants and amicus MTLA pose the question premised on *Lambert v Calhoun*, 394 Mich 179, 191; 229 NW2d 19 (1975), that essentially asks, is there a reason to ascribe to the Legislature an intent to distinguish between common law and statutory causes of action in the application of savings provisions. Looking to the accrual rules and other provisions of the RJA and No Fault Act, the answer is clearly yes.

MCL 600.5851(1) exists in the context of tort reparations with a single claim for damages that is subject to the RJA accrual rules that generally look to when the wrong was done, regardless of the time when damage results, under MCL 500.5827. There are a series of special accrual rules referenced in § 5827 which are contained in MCL 600.5829 to 5838. However, three things are noteworthy. First, none of these accrual rules apply to the one year back rule in MCL 500.3145(1). Second, they are antithetical to the accrual rule of no-fault in MCL 500.3110(4) that has a continuing accrual possibility, since RJA § 5851 is premised on a single cause of action for past, present and future damages. Third, they are incongruous with the premise of no-fault which pays without regard to fault whereas the basic RJA accrual to which RJA § 5851 is keyed is a single “wrong.”

The traditional claim for bodily injury contemplates one suit and, in that one suit, subsequent damages do not give rise to a new cause of action. See *Larson v Johns-Manville Sale Corp*, 427 Mich 301, 315; 399 NW2d 1 (1986). Thus, when MCL 600.5851 speaks to, “the person first entitled to make an entry or bring an action under this

act...under eighteen years of age or insane at the time the claim accrues,” it is referring to a tort system of reparation with a single lawsuit possibility and with an accrual rule that is notably distinct from the No Fault Act.

Therefore, to answer the *Lambert* question posed by appellant and MTLA amici, there are sound reasons to distinguish the legislative intent for tolling in other contexts compared to this statutory cause of action which has a number of different premises. One of these is that the No Fault Act is premised on tradeoffs. *See, e.g., Kreiner v Fischer*, 471 Mich 109, 114-115; 683 NW2d 611 (2004). The fundamental one is that it is not based on a “wrong” to which accrual under RJA § 5827 corresponds for accrual, and to which “accrues” is therefore referenced in RJA § 5851(1). By contrast, no-fault benefits are payable “without regard to fault.” MCL 500.3105(2). It is thus awkward at best to correlate wrong-based accrual under RJA § 5827 and its corresponding § 5851(1), to a system that is antithetical to that premise.

In short, there is no accrual rule in RJA § 5827 or its referenced RJA § 5829 to 5838 that corresponds to the No Fault Act because one is based on a single cause of action accruing when a wrong occurred, whereas the no-fault act is neither wrong based nor keyed to when that wrong occurred for its accrual rule. Thus, the “accrues” point in RJA §5851, textually does not correspond to No-Fault so as to think that the Legislature intended it to apply to the one-year back provision in MCL 500.3145(1).

This is confirmed when the accrual point for RJA § 5827, (when the single “wrong” is done), is compared to the antithetical accrual rule of MCL 500.3110(4):

“Personal protection insurance benefits payable for accidental bodily injury accrue **not when the injury occurs** but as the allowable expense, work loss or survivors’ loss is incurred.” (Emphasis added).

Plaintiffs and amicus MTLA suggest that minors and incompetents never incur an expense; while partially correct, that reasoning is obviously flawed in suggesting it leads to tolling. Rather, it negates tolling. The parents obviously do incur the expense even though their children do not, as briefed *infra*, and they have no grounds for tolling. Medical care providers likewise incur expenses and are conferred rights of direct action as reflected in *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35, 39; 645 NW2d 59, *lv den*, 467 Mich 908; 655 NW2d 554 (2002), but they too have no basis for tolling.

However, this does raise another point that is also relevant to considering legislative intent and why the Legislature has ordained a different system for no-fault benefits than general tort reparations. The nature of the benefits under the No Fault Act are such that minors are likely to have the least interest themselves in bringing a delayed no-fault benefits claim. Do plaintiffs or amicus actually point to any minor whose estate is being tapped to pay for a claim for parental care? Of course not. And the other benefits that are potentially available to a minor are either unlikely to be at issue or are likely to be recoverable by someone else.

The usual benefits thought of as compensable under MCL 500.3107 are medical bills, work loss and replacement services. Medical bills of a minor are likely to be incurred by the parent, a medical care provider that may and often does claim and sue directly, or by the Medicaid system that also may sue directly. While the plaintiffs here attempt to dress up their claims for minors and incompetents under the charade of depriving someone of needed care, this Court should not be lulled into a position of error by that illusion.

Lakeland Neurocare shows that anyone with a legitimate claim as a care provider can sue directly and so could plaintiffs here.

So what are the other possible claims that the Legislature might have been concerned about tolling if it had that concern? A wage loss claim of a minor for three years under MCL 500.3107(1)(a)? That hardly seems likely since child labor went out of style last century. Replacement services “an injured person would have performed during the first three years after the date of the accident...for the benefit of himself or herself or of his or her dependent”, MCL 500.3107(1)(c), is likewise hardly applicable to minors. Notable, however, the benefits for both of these are termed in language that negates tolling.

Unlike the situation posited by plaintiffs and their amici in *Lambert* as to a “scant reason” for a legislative intent there to not have tolling (for a single cause of action for economic and non-economic loss), here under no-fault there is every reason to think the Legislature intended a different result than to apply MCL 600.5851 to the one-year back statute in no-fault. Not only would a minor be unlikely to have a claim needing tolling, reparations under no-fault are not based on a single lawsuit for past, present and future damages, unlike the premise of RJA § 5851(1) and its accrual rule that is wrong-based under RJA § 5827. The nature of the reparations under no-fault are unlikely to be keyed to minors’ injuries, with the exception of the medical bills, and as to those, it has been recognized that the care providers themselves have a direct cause of action so that minors true interest, receiving care, is not affected by having no tolling. Certainly a person might be rendered incompetent in an accident and have claims of their own for wage loss and replacement service, but those end after three years and thus the major benefit is for medical care for which the care providers may sue directly and thus do not need tolling.

Fundamentally however, the No Fault Act is based on the tradeoff of certainty and continuing rights to benefits, for cutting off stale claims. This is the rationale for the one-year limitation, which is equally applicable to the one-year back provision. “[I]t seems consonant with the legislative purpose of the No Fault Act in encouraging claimants to bring their claims to court within a reasonable time and the reciprocal obligations of insurers to adjust and pay claims seasonably. The statute attempts to protect against stale claims and protracted litigations.” *Pendergast v Amer Fid Fire Ins Co*, 118 Mich App 838, 841-842; 325 NW2d 602 (1982) (Emphasis added).

Moreover, the tradeoff implicit in the No Fault Act of certainty of recovery for continuing and future claims as the medical bills would be incurred must be compared with the tort reparation system. This comparison provides an easy answer to the reason for the inapplicability of tolling, which would result in protracted and stale claims of minors. Under the previous tort system, a minor could previously present a one-time tort claim for past and future damages that would have included medical bills, but even it eventually would be time-barred after reaching the age of minority in light of MCL 500.5851(1). Thus, there never was an unlimited right, time-wise, for a person injured as a minor to sue.

Additionally, the degree of compensation for pre-no-fault injuries was incomplete, as detailed in *Shavers v Atty Gen*, 402 Mich 554, 621 n 47; 267 NW2d 72 (1978):

“The trial court summarized the exhibit provided by Professor W. James MacGinnis of the University of Michigan School of Business Administration as follows:

“His testimony showed that for cases of serious injuries under the tort system, 56.7% of the persons received no compensation; 11.1% received less than 50% of the economic loss, and 10.9% received between 50% and 100% of an economic loss. The balance of 20.3% received anywhere from 100% to 400% of economic loss”.

While the previous system did not compensate in a majority of serious cases anyway, no-fault claimants now are permitted an unlimited numbers of recoveries for medical care into the future, indeed, for their lifetime. As a part of this tradeoff, they are quite rationally limited by not being able to claim for stale claims of the past.

The disallowance of stale claims that are more than one year old insures that the goals of the no-fault system are met. One of these is to “provide individuals injured in motor vehicle accidents assured, adequate and prompt reparation for certain economic losses at the lowest cost to the individual and the system.” *Gooden v Transamerica Ins Corp*, 166 Mich App 793, 800; 420 NW2d 877 (1988). Another goal is affordability and “providing an equitable and prompt method of redressing injuries in a way which made the mandatory coverage affordable to all motorists.” *McDonald v State Farm Mut Auto Ins Co*, 419 Mich 146, 154; 350 NW2d 233 (1984); *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984). Additionally, this Court in its review of the no-fault legislation identified another goal, indeed a mandate that is important. It ruled in *Shavers v Atty Gen*, *supra*, that no-fault insurance be “available at fair and equitable rates,” 402 Mich 554, 605, and raised that requirement to a constitutional plane.

Delayed claims that lump up old claims of any group would then inflict a disproportionate cost allocation to current insureds and unfairly burden them with unfair and inequitable rates to pay lump sum claims that should have been spread over multiple years. If allowing stale claims, the insured motorists of this state would have to pay, through higher premiums that include MCCA assessments, for the accumulated claims. These additional costs and the untimely claims themselves would directly conflict with the

Shavers' constitutionally mandated principle of “fair and equitable rates” for no-fault insurance by burdening policyholders today unfairly and inequitably with premiums to cover accumulated losses from many past years that should have been equitably spread over those years instead of being visited on current policyholders like a reverse lottery.

II. EVEN IF MCL 600.5851(1) APPLIES TO THE NO-FAULT ACT, MCL 600.5851(1) DOES NOT TOLL THE “ONE-YEAR BACK” PROVISION OF MCL 500.3145(1) SINCE THE “ONE-YEAR BACK” PROVISION IS NOT A STATUTE OF LIMITATIONS BUT RATHER A STATUTE OF REPOSE THAT CAPS DAMAGES BY BARRING CLAIMS MORE THAN ONE YEAR OLD.

If this Court decides that a minor is the proper claimant for no-fault benefits and rules that MCL 600.5851(1) applies to the No-Fault Act¹, still, MCL 600.5851(1) does not toll the “one-year back rule” found in MCL 500.3145(1). The “one-year back rule” found in MCL 500.3145(1) is a statute of repose to which MCL 600.5851(1) does not apply. The conditions for tolling statutes of repose are provided in MCL 600.5856, but those are factually inapplicable to the one year back rule.

MCL 500.3145(1) provides:

An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. **If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.** The notice

¹ The Insurance Institute relies on its prior arguments made in its original brief and on the arguments made by Auto-Club Insurance Association for support for the proposition that MCL 600.5851(1) does not apply to MCL 500.3145(1).

of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [Emphasis added.]

The language “the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date of which the action was commenced” is statute of repose which bars recovery for older benefits by capping damages. “A statute of repose prevents a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed. A statute of limitations, however, prescribes the time limits in which a party may bring an action that has already accrued.” *Sills v. Oakland General Hospital*, 220 Mich App 303, 308; 559 NW2d 348 (1996) citing *O’Brien v. Hazelet & Erdal*, 410 Mich 1, 15; 299 NW2d 336 (1980) and *Smith v. Quality Construction Co*, 200 Mich App 297, 300-301; 503 NW2d 753 (1993). The expiration of the statute of repose literally destroys any cause of action and “the harm that has been done is *samnum absque injuria* - a wrong for which the law affords no redress.” *Smith*, 200 Mich App at 301.

A statute of limitation “prescribes the time limits in which a party may bring an action.” The language “if the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred” is thus clearly a statute of limitations.

The following sentence providing that “the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date of which the action was commenced” cannot also be a statute of limitations provision. Such an argument would

make the second sentence a mere redundancy of the first sentence in violation of the well-established rules of statutory construction. *Altman v Meridian Twp*, 439 Mich. 623, 635; 487 N.W.2d 155 (1992) [Interpreting a statute in such a way that creates a redundancy would violate established principles of statutory construction that every word in a statute has meaning and no word should be interpreted as surplusage or rendered nugatory.] Therefore, since MCL 500.3145(1) already contains statute of limitations language, the second sentence must be something other than a statute of limitations.

The language, “the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date of which the action was commenced,” acts to cap damages and affirmatively bar recovery of any loss incurred more than one year prior to the lawsuit. This language operates in much the same manner as the language found in MCL 600.5839(1). MCL 600.5839(1) provides:

No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

In *O’Brien v. Hazelet & Erdal*, 410 Mich 1, 15; 299 NW2d 336 (1980), this Court ruled that this language was both a statute of limitations and a statute of repose. In so

ruling, this Court noted that for ordinary negligence claims that accrue within six years of occupancy, use, or acceptance, the statute is a statute of limitations prescribing the period of time for which a lawsuit can be filed. *Id.* However, upon the expiration of the six years, the language of the statute become a statute of repose under which an injured party no longer has a cause of action. *Id.* at 15-16.

Like MCL 600.5839(1), MCL 500.3145(1) eliminates any cause of action for no-fault benefits incurred prior to one-year of the commencement of the action. This statutory limitation does not depend on the characteristics of the claimant or the nature of the injuries. It specifically caps the ability to allege a cause of action for no-fault benefits. This language provides that if the claimant for whatever reason (i.e. lack of information, infancy, insanity, or forgetfulness) cannot file a suit for no-fault benefits within one year of the sought benefits were incurred, then the claimant no longer has a viable cause of action for those benefits. The claimant endured “a wrong for which the law affords no redress.”

In regards to possible “tolling”, MCL 600.5851(1), the minority provision, specifically but merely provides that it applies to “period[s] of limitations.” This tolling provision does not apply to a statute of repose as the language “period of limitations” contained in MCL 600.5851(1) contemplates a statute of limitations and not a statute of repose. *Smith v. Quality Construction Co*, 200 Mich App 297, 301; 503 NW2d 753 (1993).

Statutes of repose are tolled under RJA, if at all, pursuant to MCL 600.5856, (which is factually inapplicable to MCL 500.3145(1)) since it provides:

“The statutes of limitations **or repose** are tolled in any of the following circumstances:

(a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.

(b) At the time jurisdiction over the defendant is otherwise acquired.

(c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.” (Emphasis added).

None of these provisions apply under the facts of this case. By its own terms, MCL 600.5851(1) does not apply to the “one-year back rule,” since MCL 600.5851(1) does not apply to a statute of repose. The RJA provision that does apply to a statute of repose is inapplicable. Thus, there is no RJA tolling possible for the one year back provision in MCL 500.3145(1).

III. MCL 600.5851(1) IS INAPPLICABLE TO THE ONE-YEAR BACK PROVISION OF MCL 500.3145(1) BECAUSE UNEMANCIPATED MINORS DO NOT “INCUR” EXPENSES AS A MATTER OF LAW AND SO CANNOT SEEK PAYMENT OF NO-FAULT BENEFITS, RENDERING MCL 600.5851(1), THE “MINOR” TOLLING PROVISION, INAPPLICABLE².

As a matter of law, minors do not “incur” medical expenses compensable under the No-Fault Act and therefore, MCL 600.5851(1) has no application to the No-Fault Act because the parents or other parties who do incur the expenses cannot claim tolling. The No-Fault Act does not allow a claimant who has not actually “incurred” expenses to recover benefits and any argument to the contrary is in derogation of MCL 500.3142(1), MCL

² MCL 500.5851(1) also does not apply to emancipated minors. A emancipated minor is treated as an adult under the law including the “right to sue or be sued in his or her own name” and the “right to authorize his or her own preventive health care, medical care, dental care, and mental health care, without parental knowledge or liability.” MCL 722.4e

500.3110(4) and MCL 500.3112. Indeed, Section 3112 thus “specifically contemplates the payment of benefits to someone other than the injured person.” *Lakeland Neurocare Centers v State Farm Mutual Automobile Ins Co*, 250 Mich App 35, 39; 645 NW2d 59, lv den 467 Mich 908; 655 NW2d 554 (2002).

A no-fault insurer only has a duty to pay for expenses actually incurred and expenses are not actually incurred until the injured party is liable or subject to pay for those expenses. *Proudfoot v State Farm Mutual Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003). An unemancipated minor is, as a matter of law, not liable to pay for services rendered when the minor resides with his or her parents or guardians. However, the parents and guardians are liable for payment and thus, it is the parents and guardians that “incur” the expenses and not the minors. Therefore, it is the parents and guardians who are the true claimants and not the minors.

A. Minors are not liable to pay medical costs.

It is well-established law in this state that parents have a duty and minor children have a right “to proper and necessary support; education as required by law; *medical, surgical, and other care necessary for his health, morals, or well-being*; the right to proper custody by his parents, guardian, or other custodian; and the right to live in a suitable place free from neglect, cruelty, drunkenness, criminality, or depravity on the part of his parents, guardian, or other custodian.” *Herbstman v. Shiftan*, 363 Mich 64, 67-68; 108 NW2d 869 (1961) (emphasis added). In exercising their duties to provide “medical, surgical, and other care necessary” for their children’s health and well-being, parents have the legal obligation to pay for those services. In fact, this Court has specifically ruled that children as a matter

of law are not responsible for paying for necessities, including medical care, when the children reside with parents. *Westrate v. Schipper*, 284 Mich 383, 386; 279 NW 870 (1938). Only when the minor is not being supported by his or her parents does the minor have an obligation to pay for necessities. See *In re Dzwonkiewicz's Estate*, 231 Mich 165; 203 NW 671 (1925) [minor abandoned] and *Bishop v. Shurly*, 237 Mich 76; 211 NW 75 (1926) [parent deceased]. These principles are also well-established in the common law of other states.³

If a minor residing with his or her parents is not liable for payment of necessities including medical care, then the minor cannot, as a matter of law, be the proper claimant under the no-fault act for payment of medical care as the minor has not “incurred” the expense of that medical care. However, since the parent is legally obligated to “incur” the

³See *McManus v Arnold Taxi Corp.*, 82 Cal App 215; 255 P 755 (1927); *Gaston v Thompson*, 129 Ga 754; 59 SE 799 (1907); *Estate of Woodring v Liberty Mut. Fire Ins. Co.*, 71 Ill App 3d 158; 27 Ill Dec 399; 389 NE2d 211 (1979); *Kennedy v Kiss*, 89 Ill App 3d 890; 45 Ill Dec 273; 412 NE2d 624 (1980); *Estate of Hammond v Aetna Casualty (Aetna Life & Casualty Co.)*, 141 Ill App 3d 963; 96 Ill Dec 270; 491 NE2d 84 (1986); *Gaspard v Breaux*, 413 So 2d 288 (La App, 1982); *Hoyt v Casey*, 114 Mass 397 (1874); *St. Regis Paper Co. v Seals*, 211 So 2d 547 (Miss, 1968), *ovrld on other grounds*, *Lane v Webb*, 220 So 2d 281 (Miss, 1969); *Tharp v Connelly*, 48 Mo App 59 (1892); *Butler v Metropolitan S. R. Co.*, 117 Mo App 354; 93 SW 877 (1906); *Blue Cross/Blue Shield of New Hampshire-Vermont v St. Cyr*, 123 NH 137; 459 A2d 226 (1983); *Vachon v Halford*, 125 NH 577; 484 A2d 1127 (1984); *Przestrzelski v Board of Education*, 71 App Div 2d 743; 419 NYS2d 256 (1979); *Albany Medical Center Hospital v Johnston*, 102 App Div 2d 915; 477 NYS2d 499 (1984); *Stetson v Russell*, 130 Misc 713; 225 NYS 139 (1927); *Natoli v Board of Education*, 101 NYS2d 128 (1950); *Cole v Wagnerl*, 197 NC 692; 150 SE 339 (1929); *Price v Seaboard A. L. R. Co.*, 274 NC 32; 161 SE2d 590 (1968); *Lane v Aetna Casualty & Surety Co.*, 48 NC App 634; 269 SE2d 711 (1980); *Johnstone v O'Connor & Co.* 164 F Supp 66 (DC Penn, 1958) [applying Pennsylvania law]; *Greenville Hospital System v Smith*, 269 SC 653; 239 SE2d 657 (1977); *Foster v Adcock*, 161 Tenn 217; 30 SW2d 239 (1930); *Gardner v Flowers*, 529 SW2d 708 (Tenn, 1975); *Kennedy v Kennedy*, 505 SW2d 393 (Tex Civ App, 1974); *Moses v Akers*, 203 Va 130; 122 SE2d 864 (1961).

medical expenses, the parents would be the proper claimant under the No-Fault Act in regards to the medical expenses.

In a line of cases decided prior to November 1990, the Michigan Court of Appeals held that “[t]he right to collect no-fault insurance benefits accrues to the injured person, even though another person may be legally responsible for the expenses incurred as a result of the injury.” *Commire v Automobile Club of Michigan Ins Group*, 183 Mich App 299; 454 NW2d 248 (1990); See also *Geiger v DAIE*, 114 Mich App 283, 287; 318 NW2d 833 (1982), lv den 417 Mich 865 (1983), *In re Hales*, 182 Mich App 55, 58-59; 451 NW2d 867 (1990). More recently this erroneous position has been restated in a published Court of Appeals decision. *Hatcher v State Farm*, ---- Mich App ---- (No. 262964, December 20, 2005, approved for publication February 2, 2006).

Lakeland Neurocare, however, burst the bubble by holding that a party other than an injured person could recover directly for no-fault benefits. The farragoes of the past contrary to Section 3112 should be dispelled, and with them, the house of cards that perpetuates the erroneous legal fiction that a child incurs an expense when parents care for the child, and hence has a claim subject to MCL 600.5851. Rather, *Lakeland* should be applied to hold that the parents are the rightful claimants:

“Further, contrary to the trial court's conclusion, **the fact that plaintiff was not the injured person is not dispositive. MCL 500.3112 specifically contemplates the payment of benefits to someone other than the injured person** as reflected by its inclusion of the phrase “benefits are payable to or for the benefit of an injured person” and by its discharge of an insurer's liability upon payment made in good faith to a payee “who it believes is entitled to the benefits” [*Lakeland, supra* at 39; emphasis added.]

Lakeland's interpretation of § 3112 directly contradicts the false premise that no-fault benefits “belong” to the injured person, regardless of the circumstances, and even if a minor. *Geiger* and its progeny, including *Hatcher*, are in conflict with *Lakeland Neurocare*, were wrongly decided, and this Court should specifically overrule them to moot the issue as to the interplay between RJA § 5851 and MCL 500.3145(1) where parents are the caregivers for so-called “attendant care”, (a term not found in the Act).

B. Minors are not liable to pay for “attendant” care provided by parents or guardians.

Plaintiffs invoke the “incurred” rule but fail to come to grips with the reality that it is the parents who have a claim, not the minor, for parental care of their children. In *Proudfoot, supra* at 484, this Court reaffirmed that a no-fault insurer has no duty to “pay for an expense until it is actually incurred.” This Court recognized that the parents of an injured child “incur” the expenses of attendant care in *Manley v DAIE (Manley II)*, 425 Mich 140, 153; 388 NW2d 216 (1986). There, the defendant argued that because parents are legally obligated to take care of their child, they could not recover the costs of that care. This Court disagreed.

Importantly, this Court in *Manley II* held that parents could recover the costs of their care, but it did not do so on the basis of parents having a right to sue children for parental care at common law. Parents cannot sue children for care. Children are not liable to parents for parental care. Parents are “subject to” the legal requirement to provide for their children, and they must discharge that obligation. *Manley v DAIE (Manley I)*, 127 Mich App 444, 453; 339 NW2d 205 (1983), citing 59 Am Jur 2d, Parent and Child, §§ 55, 59, pp 144-146, 149-150. Conversely, a child cannot “incur” the expenses of parental care

under this Court's definition of the term "incur" in *Proudfoot*, *supra*, because the child's parents bear the obligation to care for the child.⁴ A child therefore cannot "become liable or subject to" and hence "incur" the expenses of the child's own care by the child's parents and cannot trigger the payment of benefits for such care. The parents are the *only* true claimants.

Sections 3110(4) and 3112 thus reveal that Diane and James Cameron, and not Daniel Cameron, were the persons to whom benefits were properly payable here. Daniel's parents provided "attendant" care services for the benefit of their child, the injured person. Diane and James Cameron thus "incurred" the expense of providing that care because they were legally obligated to provide it or pay for it. *Manley II*, *supra* at 153. So Diane and James Cameron are the only persons who may recover benefits here because they are the only persons who satisfy both §§ 3110(4) and 3112.

As a result, the Camerons' efforts to bring this action in Daniel's name must fail because Daniel did not incur the expenses of his own care by his parents. Diane and James Cameron have a right to be the claimants under *Manley II*, but cannot avail themselves of RJA § 5851(1) in contravention of MCL 500.3145(1) because they are not minors or incompetent.

⁴"Since child support is his legal duty, a parent cannot charge his children for providing it. The law will not ordinarily raise any implied promise on the part of the child to pay for the support furnished by the parent, the inference or presumption being that it is furnished gratuitously." 59 Am Jur 2d, Parent and Child, § 53, p 198. Absent statutory authority to the contrary, "[s]upport liability should not ordinarily be affected by the earnings or the amount of the separate estate of a minor child. . . ." 59 Am Jur 2d, Parent and Child, § 63, p 207. This principle is well-settled in American jurisprudence. Please see *Ferrell v Ferrell*, 103 W Va 704, 706; 138 SE 399 (1927), *Lyons v Jackson*, 232 Mass 275, 278; 122 NE 304 (1919), *In re Kummer*, 93 AD2d 135, 145; 461 NYS2d 845 (1983), and *Buchanan v Buchanan*, 170 Va 458, 471-472; 197 SE 426 (1938).

IV. THE ABILITY OF THE GOVERNMENT TO COLLECT REIMBURSEMENT FOR MEDICAID PAID EXPENSES SHOULD NOT BE CONSIDERED IN DETERMINING THE APPLICATION OF MCL 600.5851(1) TO THE NO-FAULT ACT.

Amicus curiae Michigan Department of Community Health argues that MCL 600.5851(1) has to apply to the No-Fault Act including the “one-year back rule;” otherwise, the fiscal health the Medicaid system would be in jeopardy. However, as stated in this Court’s opinion in *Devillers v. Auto Club Ins. Ass’n*, 473 Mich 562, 582; 702 NW2d 539 (2005), “statutory or contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court.” Although the Michigan Department of Community Health may have concerns regarding reimbursement, those concerns cannot be rectified by this Court but should be addressed by the Department itself since it already has the tools to perfect its claims.

While it is true that under MCL 400.106, the Michigan Department of Community Health is subrogated to the rights of the persons on whose behalf the Department pays Medicaid benefits, it is the Michigan Legislature that has limited the temporal period for the Department’s ability to seek reimbursement under that subrogation. Further, the Michigan Department of Community Health has not demonstrated why it can timely determine that the person was injured in an auto accident and seek reimbursement within one year in cases involving adults but not in cases involving minors. Since medical histories routinely relate the origin of injury, the fact that someone has been in an auto accident is common knowledge in medical circles.

If the Department cannot determine which automobile insurance company provides PIP benefits for the injured party, the Department can file a claim with the Assigned Claims Facility under MCL 500.3172(1). The Assigned Claims Facility will then assign the claim to a participating no-fault insurer, which has a duty to pay the claim or determine if there is any higher priority no-fault insurer to seek reimbursement for the no-fault benefits. See *Balcher v Aetna Cas & Surety Co*, 409 Mich 231, 251; 293 NW2d 594 (1980). Therefore, the Department's argument that it will be unable to seek reimbursement is feckless, since the Department has the tools to obtain reimbursement. It only has to use the tools given it. *Cf Rory v Continental Ins Co*, 473 Mich 457, 475; 703 NW2d 23 (2005) (Insurance Commissioner directed to use existing statutory authority to review policies for reasonableness instead of asking Court to disregard contract and statutes).

Further, other state agencies have been bound to seek no-fault benefits under the time limits provided by the no-fault act. In *Dept of Transportation v. Landstar Ligon, Inc*, unpublished per curiam opinion of the Court of Appeals, No. 250744 (August 5, 2004), *lv denied*, 472 Mich 894; 695 NW2d 70 (2005) [a copy of which is attached as Exhibit A], the Michigan Department of Transportation was held to be bound to the one-year statute of limitations provided by MCL 500.3145(2) for property damage claims. Therefore, holding a state agency to the one-year back provision for no-fault medical benefits was clearly contemplated and allowed by the No-Fault Act.

The Michigan Legislature also has the ability to alter the temporal period for reimbursement and has done so in certain circumstances. MCL 600.5821 provides in relevant part:

- (3) The periods of limitations prescribed for personal actions apply equally to personal actions brought in the name of the people of this state, or in the name of any officer, or otherwise for the benefit of this state, subject to the exceptions contained in subsection (4).
- (4) Actions brought in the name of the state of Michigan, the people of the state of Michigan, or any political subdivision of the state of Michigan, or in the name of any officer or otherwise for the benefit of the state of Michigan or any political subdivision of the state of Michigan for the recovery of the cost of maintenance, care, and treatment of persons in hospitals, homes, schools, and other state institutions are not subject to the statute of limitations and may be brought at any time without limitation, the provisions of any statute notwithstanding.

In MCL 600.5821(3), it was the Michigan Legislature that imposed the same statute of limitations on the Department of Community Health as imposed upon other claimants for no-fault benefits.

Notable, the Michigan Legislature has eliminated any statute of limitations for seeking reimbursement for persons maintained by, cared for, and treated in state institutions including hospitals. MCL 600.5821(4). It could do likewise for medical bills or for statutes of repose such as one-year back provision, since MCL 600.5856 shows that the Legislature recognizes the distinction between statutes of limitations and statutes of repose. However, that decision is a decision for the legislative branch and not a decision of the judicial branch. Therefore, the fiscal concerns of the Michigan Department of Community Health should be solved administratively by use of the Assigned Claims Facility or presented to the Michigan Legislature, not to this Court.

CONCLUSION AND RELIEF REQUESTED

MCL 600.5851(1) is inapplicable to the one-year back provision of MCL 500.3145(1). The RJA provision relates to a single action accruing at the time of a “wrong,” not a no-fault system with continuing benefit accruals. It also applies to a statute of limitations, not a statute of repose. While there is a tolling statute for statutes of repose in MCL 600.5856, it is factually inapplicable. Additionally, MCL 600.5851(1) is inapplicable as the minor is not the true party in interest. No person (adult, minor, or incompetent) can obtain no-fault benefits that were incurred more than a year before any filing of a suit as those claims are claims “for which the law affords no redress”, but instead has a tradeoff remedy for continuing and future benefits that is distinct from the tort reparation system reflected in RJA § 5851.

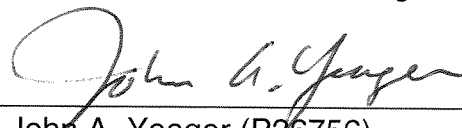
Amicus curiae Insurance Institute of Michigan therefore recommends a ruling ending the use of MCL 600.5851(1) to avoid the one-year back rule of MCL 500.3145(1).

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.
Attorneys for *Amicus Curiae*
Insurance Institute of Michigan

Dated: March 23, 2006

BY: _____



John A. Yeager (P26756)
Matthew K. Payok (P64776)
Leon J. Letter (P57447)
333 Albert Avenue, Suite 500
East Lansing, MI 48823-4394
(517) 351-6200 / Fax: (517) 351-1195

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellant,

v

LANDSTAR LIGON, INC., and RODNEY LEE
ENDRES,

Defendants-Appellees.

UNPUBLISHED

August 5, 2004

No. 250744

Ingham Circuit Court

LC No. 02-001741-ND

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals of right the trial court's grant of summary disposition to defendant under MCR 2.116(C)(7). We affirm.

This case arose on March 22, 2001, when defendant Endres struck an overpass with an over-height load of construction machinery carried on a tractor-trailer owned by defendant Landstar. Plaintiff spent several months completing the bridge's damage assessment before it sent Landstar a claim for damages in late December 2001. Landstar initially answered that it would consider the information and estimate, and then requested more information. Landstar maintained an open line of communication with plaintiff, and on March 19, 2002, a Landstar agent suggested that he would seek settling authority from the company. An employee handling the negotiations on plaintiff's behalf took the gesture as a sign that negotiations "would now begin in earnest."

In November 2002, after negotiations began and failed, plaintiff filed suit against Landstar for damaging the bridge. In its motion for summary disposition, Landstar argued that a one-year statute of limitations applied and barred plaintiff's claim. It argued that because the machinery was carried on a motor vehicle, the no-fault act eliminated plaintiff's statutory tort cause of action and provided plaintiff only one year to claim expenses from Landstar's insurer for the tangible property damage. While plaintiff could recover directly from Landstar as a self-insured entity, Landstar argued that this fact did not alter the application of the no-fault act's limitations period for tangible property damage. The trial court agreed that the one-year limitations period applied and expired before plaintiff filed its complaint, so it granted defendant's summary disposition motion.

EXHIBIT A

On appeal, plaintiff argues that the trial court erred when it applied the limitations period found in the no-fault act rather than the general tort statute of limitations for injury to property. We disagree. We review de novo a trial court's decision to grant a defendant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff first argues that the trial court improperly rejected its common-law theory that a statute of limitations never runs against the state unless the state specifically permits the statute's application to its claims. Plaintiff argues that the only statute of limitations the state has applied to itself is the general tort statute of limitations found in MCL 600.5805. We disagree. The statute that holds the state to the same limitations as individuals, MCL 600.5821(3), states "The periods of limitations prescribed for personal actions apply equally to personal actions brought in the name of the people of this state" The statutes of limitations that precede MCL 600.5821 contain several different periods of limitation regarding personal actions, including a catch-all six-year period specifically reserved for personal actions not otherwise specifically assigned a limitations period. MCL 600.5801, *et seq.*; MCL 600.5813. Applying the statute's plain language, "the periods" in MCL 600.5821(3) refer to these statutory periods and all other limitations on ordinary personal actions, including the one-year limitations period for recovering tangible property damages caused by a motor vehicle. MCL 500.3145. Therefore, the state accepted the one-year statute of limitations in MCL 500.3145, and plaintiff's contrary argument fails.

Plaintiff also argues that another statute, MCL 257.719, specifically requires truck owners to pay for the damage to overpasses that their over-height trucks hit, and the statute, rather than the no-fault act, applies to this case. Plaintiff argues that the statute creates absolute liability apart from tort and the no-fault act, and that the liability is subject to the three-year statute of limitations. We disagree. Whether the state's recovery is based on statute or common-law, it is derived from the category of law that provides a remedy for injury to persons or property – the category of law called torts. The Legislature presumptively knew of the breadth of the "tort" designation when it declared, "Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle . . . is abolished" MCL 500.3135. This abolition of tort remedies, including the remedies found in MCL 257.719, left plaintiff with only one source of recompense for the damaged bridge – Landstar's insurer. MCL 500.3121; MCL 500.3145; OAG 1979-1980, No 5479, p 132 (April 5, 1979). Accordingly, the limitations period for an action to recover from Landstar as a self-insured entity was one year from the date of the accident. MCL 500.3145(2). Because plaintiff failed to file its cause of action within the prescribed time limit, its action was barred.

Plaintiff finally argues that Landstar waived its statute of limitations defense by lulling plaintiff into postponing the filing of its complaint until after the statute had run. We disagree. Plaintiff failed to present any evidence to support its assertions until it moved for reconsideration following the summary disposition order. Therefore, this evidence arrived too late to prevent dismissal. MCR 2.116(G)(3)(a) and (5). Moreover, in its motion for reconsideration, plaintiff only presented evidence that, before the March 22, 2002 deadline, some of Landstar's agents reviewed plaintiff's demand, asked for more information, compiled a report, and prepared to negotiate the damages. Plaintiff's own negotiator admitted that she did not expect negotiations to begin in earnest until after a Landstar agent obtained authority to settle. The agent did not inform plaintiff that it would request the settlement authority until three days before the deadline.

At no point before the limitations period passed did Landstar insinuate that it would settle if plaintiff postponed filing the action. Nor did it say that it would settle regardless of the expiration of the limitations period or otherwise waive the defense. Rather, the limitations period expired due to plaintiff's woefully tardy compilation of its damage assessment and application for benefits. Because Landstar's actions did not amount to negotiation promises intended to forestall the filing of plaintiff's complaint, plaintiff's estoppel argument fails. *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997).

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell